UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Subregion 36

THE GUARD PUBLISHING COMPANY
d/b/a THE REGISTER GUARD

Respondent

and

EUGENE NEWSPAPER GUILD,
LOCAL 37194, TNG-CWA, AFL-CIO

CASES	36-CA-8743-1
	36-CA-8849-1
	36-CA-8789-1
	36-CA-8842-1

CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE

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COMES NOW, Charging Party, THE EUGENE NEWSPAPER GUILD, LOCAL 37194, TNG-CWA, AFL-CIO (hereinafter "Charging Party" or "the Union" or "the Guild"), pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (hereinafter "Board"), and files its Answering Brief to Respondent's Exceptions to the February 21, 2002 Decision of Administrative Law Judge John J. McCarrick (hereinafter "the ALJ").

I. INTRODUCTION

In his well-reasoned decision of February 21, 2002, ALJ McCarrick found that the Eugene Register-Guard ["the Register-Guard," "the Company," or "the Respondent"] had violated the Act by discriminatorily enforcing its Communications System Policy and insignia policy, respectively, against bargaining unit members, and by insisting on an illegal subject of bargaining. The ALJ accordingly upheld four unfair labor practice charges filed by the Charging

Party against the Company,[1] all of which emerged in the context of bargaining and union and employee efforts to achieve a successor contract.

First, the ALJ correctly found that Respondent engaged in the discriminatory discipline of employee Suzi Prozanski, the Union President for using the company's e-mail system for Section 7 communications[2] despite the fact that the employer permitted, and even participated in, regular use of the e-mail system for many non-business purposes.[3]

Second, the ALJ also found a violation of Section 8(a)(5)[4] in Respondent's insistence on an unlawful bargaining proposal, that the employer's electronic communications system not be used for "union business" (with "union business" broadly defined in bargaining to include, *inter alia*, employee-to-employee communications about bargaining issues), finding that the Company's proposal would simply seal and enshrine the historical, discriminatory application of the Company's communication systems policy against Section 7 speech.

Finally, the ALJ also rightly found that Respondent violated Section 8(a)(1) by enforcing an ill-defined, unwritten insignia policy against Mr. Ron Kangail, a District Manager and an active union member, who was ordered by his supervisor to remove a green felt armband and an 8 ½ x 11" placard from the back window of his car when at work outside of the company's

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[1] An amended, consolidated Complaint issued on October 15, 2001.

[2] Section 7 of the NLRA, 29 U.S.C. §157 states, *inter alia*, that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

[3] Case no. 36-CA-8743-1.

[4] Cases nos. 36-CA-8789-1, 36-CA-8842-1

building.[5] The Company did not demonstrate any special circumstances which would justify this curtailment of the Section 7 rights of Mr. Kangail and other employees.

Respondent excepts to these findings. The ALJ's findings that the Register Guard's actions violate the Act draw on extensive factual testimony, are consistent with NLRB precedent, and should be upheld on appeal.

II. FACTUAL BACKGROUND

The ALJ found that the Eugene Newspaper Guild represents employees at the Eugene Register Guard in the following departments: Editorial, Circulation, Business Office, Display and Classified Advertising, Human Resources, Promotion, and Information Systems. D.1, L.41-44; Resp. Ex. 5.[6] The ALJ found that the Guild represents reporters, photographers, copy editors, business office employees, secretaries, clerks, news aids, advertising employees, and district managers. D.1, L.44, D.2, L.1-2; Tr. p. 72. Testimony was given about extensive newsroom employee use of their computers and email systems, including by reporters and copy editors. Tr. 356-57; Tr. 131:3-8; Tr. 378:14-17; Tr. 380:3-11. The ALJ found that all but 15 employees have e-mail access. D.2, L.9-10.

The Respondent promulgated a Communications Policy, which applies to the use of Respondent's communications systems, D.3, L.14-15, including its e-mail system. G.C. Ex. 2.

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[5] Case no. 36-CA-8849-1

[6]Reference to the Record will be made as follows: Reference to the Transcript will be designated as "Tr"; references to Exhibits will be designated as "Ex."; references to the Administrative Law Judge's decision will be designated as "D." References to specific lines will be designated as "L", or by semicolon following Transcript references.

The Communications Policy prohibited non job-related solicitations. D.3, L.16-19; G.C. Ex. 2.

The most recent collective bargaining agreement between the parties expired on April 30, 1999. D.3, L.3; Contract, Resp. Ex. 5, p. 25. Each of the employer actions which is the subject of the Complaint took place in the context of ongoing contract negotiations and employee and union efforts to achieve a new contract. The ALJ found that the Respondent disciplined Ms. Suzi Prozanski, an employee of the Respondent and President of the Union, for sending e-mails to other employees regarding union activities on the company e-mail system. D.3, L. 29-30; D.9, L.6-10. Mr. Ron Kangail was ordered to remove union insignia from his arm and personal vehicle which he had displayed to increase support for the achievement of a new contract. D.4, L.35-36; 52; D.5, L.1-2. Tr. 256:24- 257:25. Finally, the Register-Guard insisted upon a proposal which codified its communications policy to prohibit union use of e-mail, a policy which had previously been enforced in a discriminatory manner and therefore was an illegal subject of bargaining. D.10, L.36-38.

III. ARGUMENT

A. The ALJ correctly found that the Respondent enforced its Communications Policy in a discriminatory manner, in violation of Sections 8(a)(1) and (3) of the Act.

1. The ALJ correctly shifted the burden of persuasion to the Respondent after the General Counsel made a prima facie showing of discrimination.

The ALJ correctly found that the General Counsel made out a prima facie case of discrimination against union activities, in proving that the Respondent disciplined Prozanski for sending e-mails relating to Union business, while permitting a wide variety of other personal uses

of Respondent's e-mail. Following the Board approach set out in Wright Line, Wright Line Div., 251 NLRB 1083, 1088, *enforced* 662 F.2d 899, (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), an approach affirmed by the Supreme Court in NLRB v. Transportation Management Corp., 462 U.S. 393, 404 (1983), the ALJ then shifted the burden of proof to the Respondent, to prove that it would have disciplined Prozanski regardless of her union activity. D.9, L.14-17. The ALJ correctly found that Respondent failed in meeting this burden, given Respondent's complete failure to have enforced its communications policy on the numerous other occasions that employees used e-mail for personal use. D.9, L.21-23.

The Respondent argues that the ALJ misallocated the burden of proof, erroneously asserting that Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries, 512 U.S. 267 (1994) overturned the Board's Wright Line doctrine. This argument is without merit. Greenwich Collieries clearly states that the Board's Wright Line approach of allocating the burden of persuasion to the employer to rebut is consistent with §7(c) of the Administrative Procedure Act, "because the NLRB first required the employee to persuade that antiunion sentiment contributed to the employer's decision. Only then did the NLRB place the burden of persuasion on the employer as to its affirmative defense." Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries, 512 U.S. at 278. See also CPS Chemical Co., 324 NLRB 1018 (1997).

2. The ALJ was correct in finding that Respondent discriminated against Prozanski for the exercise of rights protected under §7.[7]

The ALJ correctly found this matter to be a simple case of discriminatory discipline. Ms. Suzi Prozanski – copy editor and Guild president-- was warned and threatened with discipline up to and including termination for nonbusiness use of the email system for a Section 7 purpose when that system was historically used for multiple nonbusiness purposes. The ALJ correctly concluded that these actions by the Company violated Sections 8(a)(1) and 8(a)(3) of the Act.

The Employer introduced an e-mail system into the workplace in 1996 and through the summer of 1997. D.3, L.7-9; Tr. 351:13-23. In the fall of 1996, the employer issued a "Company Communication Systems Policy" ["1996 Policy," G.C. Ex. 2] which established certain guidelines for all employees. Tr. 57: 13-18 (testimony of Human Resources Director, Cynthia Walden). The ALJ correctly found that there was no evidence that the parties executed a written agreement reflecting an accord regarding the Communications Policy. D.3, L.23-24.[8]

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[7]Respondent's Exception 70, arguing that it should be allowed to review Board affidavits containing issues unrelated to the subject matter of the witness, is squarely and unequivocally contradicted by §102.118(b)(2) of the Act, which clearly states that it is the ALJ who is to review Board affidavits ***in camera*** to determine whether the affidavits contain material relevant to the charge in question. See Caterpillar, Inc. and UAW Local 145, 1751, 786, 974, and 2096, 313 NLRB 626, 627 (1994) (emphasis added).

[8]Respondent's exception to this finding has no merit. Ms. Cynthia Walden, the Company's Human Resources Director, sought to characterize this Policy as a result of collective bargaining to which the Guild agreed. However, the Policy itself states that it is not a contract and it was not signed by the Guild. G.C. Ex. 2, first paragraph. Ms. Walden also conceded that there was no memorandum of agreement or contract term by which the union signified consent with this Policy. Tr. 63:21-62:4; 432:17-20. The current contract was executed on October 16, 1996 approximately 12 days after the issuance of the Policy (October 4, 1996). It appears that employees, managers and Guild representatives voiced opposition to the Policy as it was originally issued (Tr. 60:19-23; 420:8-24), and Charging Party [CP] Exs. 1-2 and G.C. Ex. 2) and that as a result of these critics, the Company made some changes to the Policy, including reassuring employees that they could continue to utilize employer communications systems for personal reasons (for example, calling one's children). Furthermore, there is nothing in the

The 1996 Policy addresses the use of telephones, two-way radios, fax machines, copiers, computers and electronic mail. As the ALJ found, the 1996 Policy's first "General Guideline" notes that the systems are "for Company use to assist in conducting Company business" and that they are "not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." D.3, L.17-19; G.C. Ex. 2. The 1996 Policy also clearly contemplates that personal use of the communications systems will be permitted. The cover memo, dated October 4, 1996 indicates that past practice, including personal use of the systems, will be permitted to persist. Furthermore, the Policy itself contemplates personal usage, indicating that employees will need to reimburse the Company when charges are incurred for personal usage.[9] Human Resources Director Cynthia Walden also testified that personal e-mail and telephone calls have been permitted historically. Tr. 384:9-11; Tr. 397:2-26 and G.C. Ex. 42; Tr. 423:4-9.

The ALJ correctly found that non-business uses were not only knowingly tolerated by

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language of the Policy that would constitute a "clear and unmistakable waiver" of the rights of employees or employee officers to communicate about Section 7 matters over the Company's communications systems. Neither the union nor Section 7 subjects are mentioned in the 1996 Policy. The prohibition against commercial and charitable solicitations is not self-evidently applicable to collective bargaining issues between the bargaining representative and unit members. Under Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983), there was no union waiver in the 1996 Policy to discuss "union" or other Section 7 matters on the company's communications systems, including e-mail.

[9] See the section on telephones, items 1 and 2 ("It is recognized that it may be necessary for employees to make and receive personal calls during work hours") and the section on Computers, Fax Machines and Copy Machines ("If it is necessary for employees to utilize Company equipment for personal use, employees are to pay the Business Office . . ."). Evidence was presented at the hearing that e-mail use does not result in a monetary cost to the employer, that text messages take up very little space in the computer system, that the system receives approximately 3,000-4,000 e-mails per day, and that no system failure has ever resulted from the sending of e-mail. Tr. 322-324.

management, but managerial and supervisory employees themselves openly engaged in non-business use of the Company's email system. D.4, L.3-4. The ALJ, relying on uncontroverted evidence presented at the hearing, found that the e-mail system had been used for such subjects as parties, jokes, breaks, community events, sports events, births, social meetings, etc.[10] D.4, L.3-23; Tr. pp. 161:22-162:12; 164:23-165:25; 217; 273-274; 295-298; 315-316; 317:10-17. Employees also testified that they regularly receive unsolicited junk mail (Tr. 216:25-217:1; 273:22-23; 293:4-8) and "crack-pot correspondence from the public" (Tr. 294:23-25).

The ALJ correctly found that Ms. Prozanski received two disciplinary memos in 2000 for her use of the e-mail system. D.3, L.38-52; D.4, L.1. The first letter, dated May 5, 2000 (G.C. Ex. 8), was issued by Dave Baker, the managing editor of the newsroom (Tr. 325-26). The piece of e-mail for which she was disciplined was introduced as G.C. Ex. 7. In it, Ms. Prozanski sought to explain some issues surrounding the Guild rally which had taken place a few days prior. Tr. 78-83 (Prozanski testimony); Tr. 327-329 (Dave Baker testimony). Managing Editor Dave Baker testified that he had originally communicated via e-mail to the staff about the possible attendance of outside anarchists at a Guild rally. Baker testimony, Tr. 327, L. 3-5. According to Ms. Prozanski's unrebutted testimony, she composed an e-mail at her work station and sent it on non-work time to reply to the e-mail sent by Mr. Baker, clarifying his concerns about safety at the Guild rally. Tr. 81-85. Ms. Prozanski was first orally reprimanded by Dave

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[10] See, for example, G.C. Exs. 3, 4, 10-17, 19-23, 27-42, 44-48, 55-59. Stipulation #1 (G.C. Ex. 60) contains the names of managers who appear as authors or recipients in many of the General Counsel Exhibit emails just listed. Oral testimony also confirmed managers' involvement. Tr. 161:11-15; 218. There is no evidence that any employees other than Suzi Prozanski and union member Bill Bishop were ever disciplined for nonbusiness use of the email system.

Baker who reminded her of the 1996 Communications Policy (which she testified she did not directly recall) and was then issued the May 5, 2000 warning letter.[11] G.C. Ex. 8.

The ALJ also found that Ms. Prozanski subsequently composed and sent two e-mail messages in August 2000 (G.C. Exs. 5 and 6), for which she also received a disciplinary/warning letter, this time from Ms. Cynthia Walden, the company's Human Resources Director. D.3, L.46-52; D.4, L.1; G.C. Ex. 9. Ms. Prozanski testified that she created and sent these e-mail from the Guild office. Tr. 87-88.[12] The August 22, 2000 warning/disciplinary letter claims that Ms. Prozanski had agreed to refrain from using the company's systems for "union/personal business" and that her two e-mails in August violated the "spirit and letter" of the communications policy. The two August 2000 e-mails included one which encouraged employees to wear green in support of a fair contract[13] (G.C. Ex. 5) and another e-mail which alerted and invited employees and their families to participate in the Guild's entry in the Eugene Celebration Parade (G.C. Ex. 6).

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[11] The Company justified its actions against Ms. Prozanski in part because of the number of recipients of her e-mails, even mislabeling it "spam." G.C. Ex. No. 9, 1st para.; Tr. 35:14-22. ("Spam", as defined by AOL, Inc. v. IMS, 24 F. Supp. 2d 548, 549 (E.D. Va. 1998), is "unauthorized bulk e-mail advertisements", clearly not what Ms. Prozanski sent.) However, she was only responding to the group recipients on Dave Baker's original e-mail message. Furthermore, Ms. Prozanski's were not the only nonbusiness e-mails that had a sizable recipient list. As noted, Mr. Baker had originally sent an e-mail to the newsroom staff about the Guild rally (Tr. 85:14-16), and he was not disciplined. The record further includes managerial initiated non-business "mass e-mails" for which no discipline was ever issued. G.C. Ex. 4, Tr. 56:6-21; G.C. Exh. 3, Tr. 97-97; G.C. Exh. 10, Tr. 162-163; G.C. Ex. 16; G.C. Ex. 27; G.C. Exs. 29, 30, 32, 42; G.C. Ex. 47 and Tr. 182; G.C. Ex. 55; G.C. Ex. 56; G.C. Exs. 57 and 58.

[12] She also testified that she had understood from the May 2000 warning that she was "disciplined for using the equipment at the company to send the e-mail" and that she "didn't think that it would apply if I sent it from the Union office." Tr. 88.

[13] The last contract expired on April 30, 1999 and negotiations are ongoing. Tr. 142-143.

Thus, after three years of tolerating and engaging in a wide range of non-business use of the company's e-mail system, the Register-Guard cracked down on Ms. Prozanski's non-business e-mails. The ALJ correctly held that this action is clearly in violation of the fundamental and long-established principle[14] that where a company allows non-business use of its property, it cannot discriminate against a use because of its union or other Section 7 content. If the company's "Communication Systems Policy" is deemed to be a non-solicitation rule prohibiting, *inter alia*, non-business related communications over its e-mail system, the law is clear that where non-job related communications are permitted, the employer cannot enforce the rule against union solicitation.[15] Visador Co., 303 NLRB 1039, 138 LRRM 1232 (1991), *enforced without opinion*, 972 F.2d 341, 141 LRRM 2152 (4th Cir. 1992) (no-solicitation rule which was

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[14]As detailed below, the Board and all circuits, save the 7th Circuit, have long followed this rule. The 7th Circuit's departure from this rule, analyzing disparate treatment only between unions and other "outside organizations" is an anomaly. See 6 West Limited Corp. v. NLRB, 237 F.3d 767 (7th Cir. 2000); Guardian Industries Corp. v. NLRB, 49 F.3d 317 (7th Cir. 1995). Nonetheless, even under the 7th Circuit's analysis, and even assuming *arguendo* that the employees speaking to other employees on Section 7 protected activities in the current matter were an "outside organization", the ALJ correctly found that Respondent discriminated by disciplining the senders of union-related messages, while tolerating messages posted on behalf of other "outside organizations", such as Weight Watchers and the United Way. D8, L40-41. Respondent's attempts to explain this disparate treatment– the Company supported and approved of the efforts of Weight Watchers and the United Way, and, by extension, did not support the activities of the union– only highlight the fact that the Company's decisions as to which non-job related solicitations it would permit were made in a discriminatory fashion. Respondent's Brief, 33.

[15] In support of its charge, the union also contends that Ms. Prozanski's communications were not from an "outside organization" as alleged by the Company. The Eugene Newspaper Guild is the representative of employees at the Eugene Register-Guard. Officers are also employees. The Guild was chosen by the employees as their representative for bargaining over working terms and conditions at the Register-Guard. The employee members and officers of the union do not consider themselves to be outsiders of the company, but an integral component of it.

enforced against union solicitations but not against nonunion solicitations was unlawful); Opryland Hotel, 323 NLRB 723, 155 LRRM 1083 (1997) (Board held unlawful the enforcement of no-solicitation rule to deny union access while employer allowed access to non-business betting pools, charity sales, and Girl Scouts).

The ALJ correctly likened this situation to other cases in which an employer has permitted or tolerated the use of its property or business for non-business communications. In such circumstances, the Board has held that the NLRA prohibits the employer from discriminating against union or Section 7 communications. Further, if this 1996 Communications Policy is considered a regulation of employer equipment, the employer may not discriminatorily enforce that policy against union or Section 7 conduct. Once an employer cedes the use of its space or equipment to nonbusiness purposes (regardless of whether there exists a facially neutral rule), it may not then shut down only union or related Section 7 uses. Sprint/United Management Co., 326 NLRB 397 (1998) (Board analogized permitted personal use of lockers to an employer's concession of bulletin board space for nonbusiness use; therefore, the employer could not prohibit distribution of union materials in the lockers); Fleming Companies, Inc., 336 NLRB No. 15 (Sept. 28, 2001)(where the employer allowed a "wide range of personal postings" on a bulletin board, it could not proscribe and remove union postings); Fixtures Manufacturing Corp., 332 NLRB No. 55 fn. 3 (Sept. 2000)(employer could not prohibit Section 7 material on bulletin boards when it permitted other nonbusiness material and "fact that pro-union and antiunion materials were banned does not warrant a contrary result"); Storer Communications, Inc., 294 NLRB 1056 (1989)(where the employer permits managerial employees' use of bulletin boards to express its version of union-company meetings, it may not prohibit union

representatives from publishing their version of the same meetings on the bulletin board); Honeywell, Inc., 262 NLRB 1402 (1982), *enf'd* 772 F.2d 405 (8th Cir. 1983)("where an employer permits its employees to utilize bulletin boards for the posting of notices relating to personal items such as social or religious affairs, sales of personal property, cards, thank you notes, articles, and cartoons, commercial notices and advertisements, or, in general any non-work related matters, it may not 'validly discriminate against notices of union meetings which employees also posted.'")(emphasis added, citing Axelson, Inc., 257 NLRB 576, 579 (1981), other footnotes omitted); see also, May Dept. Stores Co., 59 NLRB 976 (1944), *enf'd*, 154 F.2d 533 (11th Cir. 1946); Northeastern Univ., 235 NLRB 858, 865 (1978)(employer unlawfully restricted union use of meeting room while allowing other groups to use meeting rooms).

In Honeywell, the Board noted that the company permitted "the posting of notices relating to 'company-approved or company-sponsored' organizations such as United States Savings Bonds, the United Way, and the Boston Pops Orchestra." Honeywell, Inc., 262 NLRB 1402, at 1403. In this case, the Register-Guard also acknowledged, and the ALJ correctly found, that it allowed United Way solicitations and other company approved activities -- such as Weight Watcher's meetings -- to be the subject of e-mails at work. D.8, L.40-41, Tr. 396; G.C. Exs. 57 and 58. The Human Resources Director testified that these e-mailings did not violate the 1996 Policy because they were company-sponsored or approved. Tr. 396. In Honeywell, the Board held that the fact of company sponsorship did not remove the stain of discrimination against union e-mail. Similarly, in this case, the fact that the Company approved use of its e-mail system for the United Way and other outside organizations while prohibiting union and Section 7 use by Register-Guard employees is evidence of the company's discrimination.

As noted by the ALJ, the Board has already applied this theory of discriminatory access to the use of electronic mail. D8, L8-12. In E.I. du Pont de Mentours & Co., 311 NLRB 893 (1993), the Board affirmed the ALJ's holding that the company had violated 8(a)(1) of the Act by "discriminatorily prohibiting employees from using the electronic mail system for distributing union literature and notices" citing Storer Communications, *supra*. The ALJ in E.I. du Pont had found that e-mail had become "an important, if not essential, means of communication," and that the evidence "reveal[ed] that the Company permits employees to use the electronic mail to distribute a wide variety of material on many subjects." *Id.*, 311 NLRB at 919. The instant case may be determined directly under the precedent of E. I. du Pont, where the ALJ could have as easily been speaking about the Register-Guard:

> I do find that having permitted the routine use of the electronic mail by committees and by the employees to distribute a wide variety of material that has little if any relevance to the Company's business, the company discriminatorily denies employees' use of the electronic mail to distribute union literature and notices.

Id. at 919. Neither the judge, nor evidently the Board, in that case found persuasive or relevant the Company's argument that the union had "less costly alternative methods" to communicate with unit members or that the company had "legitimate, non-discriminatory" reasons for prohibiting all union business over the e-mail system. *Id.* at ** 45.[16]

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[16] The Board has also held that when the employer's workplace practice allows employees to utilize e-mail and telephones and otherwise spend "some working time on nonwork pursuits," an employee's e-mail communication to other employees challenging a potential change in vacation policy was concerted, protected activity for which the employee could not lawfully be disciplined. Timekeeping Systems, Inc. 323 NLRB 244 (1997).

3. Respondent's argument that it has an absolute right to ban all use of e-mail for Section 7 purposes, even when tolerating other non- job related uses of e-mail, is not supported by case law.

Respondent argues that, even if it did discriminate by disciplining employees for using e-mail for Section 7 purposes, while tolerating a wide use of other non- job related uses of e-mail, it has an absolute property right in the e-mail system which allows it to ban any Section 7 use of e-mail at any time. This argument is based on a faulty reading of Board law, and faulty analogy to the law regarding property access by non-employee Union organizers.

First, Respondent has overstated the holding of Mid-Mountain Foods, Inc., 332 NLRB No. 19, *10 (slip opinion) (2000), claiming that the case held that under no circumstances do "third parties" have the right to use "company equipment." While the Board did hold in Mid-Mountain that the company did not have to permit the showing of a union video on the company television set, it also noted that the TV was "not subject to the control and personal use" of the employees and was always set to the same channel, and that it had not been established that the employer permitted employees to show other videos. *Id.* Here, in contrast, there was ample use of e-mail, and the ALJ found that the employer discriminated against use of the e-mail for Section 7 purposes, as opposed to other personal uses.

Second, Respondent spills much ink in an attempt to analogize the current case to cases which upheld bans on non-employee union organizer access to employer property. This is like comparing apples and oranges. Lechmere Inc. v. NLRB, 502 U.S. 533-534 (1992), distinguished between the Section 7 rights of employees, and the rights of non-employee third party organizers, which were only derivative of employees' Section 7 rights. Given the derivative nature of rights

for non-employee organizers, Lechmere thus held that an employer could limit or prohibit their access to company property:

> As a rule, then, an employer cannot be compelled to allow distribution of union literature by **nonemployee organizers** on his property.

Id. at 533 (emphasis added). In the present case, however, as the users of the e-mail were all employees and not outside third parties, the Lechmere analysis on access to property is inapplicable.[17]

Finally, Respondent's extension of this argument, that employees' use of the employer's e-mail system for Section 7 activities thus constitutes a trespass to chattels, fails for the same reason: the users of the e-mail were not outside organizations, but employees of the Respondent, who were found to have a right to use e-mail for Section 7 activities given the Respondent's discriminatory application of its Communications Policy. This is in stark contrast to cases such as Intel Corp. v. Hamidi, 2001 Cal. App. LEXIS 3107 (Dec. 10, 2001) and AOL v. IMS, 24 F. Supp. 2d 548 at 550 where non-employee outsiders engaged in non-authorized use of the company e-mail system to "pester" employees. See Intel Corp., 2001 Cal. App. LEXIS 3107 at *35; AOL v. IMS, 24 F. Supp. 2d at 550. Here, there was no hijacking of the company communications system for unauthorized purposes by an outside non-employee, and no trespass was committed.

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[17]Thus, Respondent's further analysis of alternatives channels to communication open to the Union, performed under Lechmere for the outside, non-employee union organizers, is also inapposite.

4 . Respondent incorrectly asserts that claims are time-barred by §10(b).

Respondent incorrectly asserts that, on a claim that a no-solicitation policy is being enforced in a discriminatory manner, the §10(b) statute of limitations should begin to run at the promulgation of the policy rather than at the time it was discriminatorily enforced. The Board has unequivocally held, however, that in a discriminatory enforcement claim, the period in which to file a ULP charge under §10(b) of the Act begins to run at the time of the specific instance of discriminatory enforcement being questioned. See Control Services, Inc. and Local 32B-32J, SEIU, 305 NLRB 435, 437 (1991), citing Alamo Cement Com. and United Cement, Lime, Gypsum and Allied Workers, 277 NLRB 1031, 1036-1037 (1985).

Respondent also takes exception to the ALJ's finding that the first warning to Prozanski was closely related to the second warning, and thus not time-barred by §10(b). This exception is without merit. The Charging Party timely filed charge 36-CA-8743 alleging that the second disciplinary warning to Prozanski violated the Act. See D.1, fn1. The ALJ correctly found that the allegation in the complaint regarding the first warning was "closely related" to the timely charge under NLRB v. Fant Milling Co., 360 U.S. 301, 309 (1959). Under the Redd-I, Inc., 290 NLRB 1115, 1115-1116 (1988) standard for evaluating whether an uncharged allegation may be considered "closely related" to another allegation, the Board is to consider the factor of whether the two allegations arise from the same factual circumstances or sequence of events, involve the same legal theory, and implicate the same or similar defenses. Here, the two warnings and factual situations surrounding them were extremely similar, and the legal theory and applicable defenses are identical.

5. Respondent's contention that the ALJ finding of discriminatory enforcement of the Communications Policy consisted of inappropriate "contract interpretation" is without merit.

The Respondent contends that the ALJ's finding that the Company enforced its Communications Policy in a discriminatory fashion consisted of inappropriate "contract interpretation." This contention is without merit. The ALJ's determination that the Respondent discriminated in its enforcement of the Policy was predicated on a finding that the Company only enforced its policy against union activity, and did not enforce it against a wide range of other non-job related solicitations. D.9, L.19-21 ("the Communications Policy was observed in the breach, not the enforcement.")

Furthermore, Respondent's premise that any examination of a contract in the course of assessing whether a violation of the Act has occurred is a faulty one. It is well-settled that the Board may examine contracts in such situations as to gauge whether the union had agreed to give up statutory safeguards. C & C Plywood, 358 U.S. 421, 428 (1967). The Board has in the past examined agreements to determine the discriminatory application of a solicitation policy, without running afoul of Respondent's concerns about "contract interpretation." See Restaurant Corp. v. NLRB, 827 F.2d 799 (D.C. Cir. 1987); NLRB v. S.E. Nichols, Inc., 862 F.2d 952, 960 (2d Cir. 1988).

The case Respondent cites for its curious proposition on "contract interpretation" is not applicable to the current situation. In Intrepid Museum Foundation, Inc., 2001 WL 967464 (August 22, 2001), the ALJ properly chose not to engage in the "contractual interpretation" of a narrow issue of whether the employer's interpretation of what level of evidence of drug use by

employees constituted "reasonable cause" for drug testing under an agreement that had been agreed to by the union. As the employer's interpretation of the agreement was plausible, the ALJ held that it was not a unilateral change to the contract. The ALJ did hold, however, that the Board "does in various circumstances interpret contractual clauses", and only declined to in this case, which was "solely" contractual interpretation. *Id.* at *30. The current case, however, is a routine one of examining whether the enforcement of a policy implemented by the employer was done in such a way as to discriminate against Section 7 rights, and is not a case "solely" of contractual interpretation.

B. The ALJ correctly found that Respondent's Counterproposal No. 26 was an unlawful codification of a discriminatory policy

1. The ALJ was correct in finding the proposal to be an illegal subject of bargaining.

The ALJ correctly found that Counterproposal No. 26 ("CP 26"), the flat prohibition at all times of using e-mail for Union business, was an unlawful codification of the discriminatory enforcement of the Respondent's Communications Policy and therefore an illegal subject of bargaining. D.10, L.36-38. As the ALJ properly found, a party may raise an illegal subject of bargaining without a necessary violation of the Act, but insistence on an illegal subject violates Section 8(a)(5) of the Act. D.10, L.21-27, citing California Pie Co., 329 NLRB 968, 974 (1999).

Respondent mistakenly asserted that the ALJ held that CP 26 was both a mandatory subject of bargaining and an illegal one. The ALJ did not reach the question of whether the proposal was a mandatory subject or not, as he held that it was an illegal codification of a discriminatory policy. In any event, the Board has previously found subjects of bargaining which

touch on terms and conditions of employment (the hallmarks of mandatory bargaining subjects) to nevertheless be illegal when they contravene a right protected by the Act. See, e.g., Chesapeake Plywood, Inc., and Int'l Woodworkers of America, 294 NLRB 201 (1989), enf'd, 917 F.2d 22 (4th Cir. 1990) (finding that employer's insistence on modification to EEOC-approved settlement as condition for agreeing to collective bargaining agreement as a violation of Section 8(a)(5) of the Act).

Respondent further challenges the ALJ's finding that its proposal is illegal, on grounds that the Board can not "interject its opinion as to the parties' bargaining positions and proposals." Yet it is well settled that the Board is under an obligation to examine proposals to determine, in its opinion, whether good faith bargaining has occurred, or whether a party is insisting on an illegal subject.

The cases cited by Respondent are inapposite. Atlanta Hilton & Tower, 271 NLRB 1600 (1984) merely stated the truism that the Board "cannot force an employer... to adopt any particular position" in bargaining; it did not state that the Board cannot examine employer's positions in the context of unfair labor practice charges. Indeed, it went on to state that "it is necessary to scrutinize an employer's overall conduct to determine whether it has bargained in good faith", and cited such indicia of refusing to bargain in good faith as "unreasonable bargaining demands" and "unilateral changes in mandatory subjects of bargaining", and "withdrawal of already agreed-upon provisions"; all of these would require the Board to formulate an opinion as to whether such proposals and positions were unlawful. *Id.* at 1603. Similarly, John Ascuaga's Nugget, 298 NLRB 524 (1990), relied on by Respondent, stated that, while the Board can not pass on the acceptability of each proposal made by the parties, it could

consider a party's "insistence on "extreme proposals" to determine whether a demand was "designed to frustrate agreement on a collective bargaining contract."" *Id.* at 527.

2. Respondent's exception to the failure of the ALJ to find that the Union could waive unit members' rights to use e-mail for Section 7 purposes is without merit.

The ALJ did not address whether the Union could waive unit members' rights to use e-mail for Section 7 purposes. Respondent excepts to the ALJ's failure to find that the Union could waive such rights.[18]

Under governing Supreme Court and Board law, a union may not lawfully waive employee rights to engage in certain kinds of speech in work areas on non-work time. NLRB v. Magnavox, 415 U.S. 322, 85 LRRM 2475 (1974). In Magnavox, the Supreme Court invalidated a longstanding, collectively-bargained blanket no-distribution rule because it waived fundamental employee rights, reasoning:

> The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees. So long as the distribution is by employees to employees and so long as the in-plant solicitation is on non working time, banning of that solicitation might seriously dilute Section 7 rights.

Certainly, under the narrowest reading of Magnavox, speech about decertification may not be restricted (except where the employer demonstrates some *bona fide* business justification[19],

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[18]Respondent's Exception 85. The Exception contains an apparent error on its face. It excepts "[t]o the finding and conclusion [sic] that as a matter of law, the union could... waive the unit members' rights, if any, to use Respondent's communication system... as such failure to find and conclude is contrary to law."

[19] The Company neither raised nor presented evidence on issues of productivity, cost, efficiency or discipline. Rather, what evidence there was on this issue tends to demonstrate that use of e-mail in the workplace for business and nonbusiness purposes has created efficiencies

which it has not even attempted to do in this case). However, Magnavox's logic surpasses that narrow issue, and later Board cases have clearly extended the Magnavox holding to other topics that would be banned under the Employer's electronic communications proposal at issue here.

Subsequent Board decisions have established that there can be no valid and legal waiver of employee rights to communicate at the workplace on any matter directly related to their employment relationship or their working conditions. Ford Motor Co., 233 NLRB 698, 96 LRRM 1513 at 1515 (1977); McDonnell Douglas, 210 NLRB No. 29 (1974). This extension of Magnavox is intended to safeguard the workplace rights of employees to discuss or solicit employee support on matters affecting any and all terms and conditions of employment, regardless of whether or not the union supports their position. Thus, employees must remain free to discuss and debate ongoing contract negotiations, wages and other employment benefits, issues affecting their workplace, management supervision, and their general support for collective bargaining. Only through the free discussion of such matters at the workplace, the Board has reasoned, may employees intelligently evaluate the performance of their bargaining representative and their rights of self organization. See In re Mead Corp., 331 NLRB No. 66 (2000)(Section 7 rights include the right "to engage in activities by which employees may seek to change their bargaining representative, to opt for no bargaining representative or to seek to retain the present one.")

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that have ultimately benefitted the employer. The Company's only evidence appears to be that the communications system, including all the hardware, was a multi-million dollar investment. There was no evidence, however, of any adverse impact from non-business messages from employee to employee. Joe Clark, an employee in the Information Systems Department, testified that e-mail messages present no unique or additional cost to the employer and that text messages do not put any measurable burden on the employer or its computer system. Tr. 322:19-323:1.

Cases relied on by Respondent actually **support** the holding that unions may not waive solicitation and distribution rights. For example, Respondent correctly noted that NLRB v. Mid-States Metal Products, Inc., 403 F.2d 702, 705 (5th Cir. 1968) can not waive rights that go "'to the heart'" of the right of employees to change their bargaining representative, or to have no bargaining representative." Respondent failed to note that, in the very next sentence following the cited passage, the Fifth Circuit clarified that solicitation rights are indeed such unwaivable rights, stating that:

> Solicitation and distribution of literature on plant premises are important elements in giving full play to the right of employees to seek displacement of an incumbent union. We cannot presume that the union, in agreeing to bar such activities, does so as a bargain for securing other benefits for the employees and not from the self-interest it has in perpetuating itself as a bargaining representative.

Id.

Similarly, NLRB v. United Technologies Corp., 706 F.2d 1254, 1260, 1264 (2d Cir. 1983), also cited by Respondent, upheld the Magnavox rule against the union waiver of solicitation and distribution rights; it merely permitted the contractual limitation of such solicitation to paid breaks, but not to lunch hours and other unpaid time on company property, as per the parties' long held understanding of the term "working hours." The Respondent's CP 26, by contrast, would ban all union-related e-mails, even on non-work time. While the Respondent correctly states that a union may agree to time restrictions placed on solicitation, these restrictions must be in themselves lawful under Republic Aviation and its progeny.[20]

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[20]Hotel Employees & Restaurant Employees Union, Local 5 v. Honolulu Country Club, 100 F. Supp. 2d, 1254, 1257 (D. Hawaii 1999), also relied on by the Respondent, merely gave deference to an arbitrators' decision that parties had agreed not to solicit during working hours, and that breaks were considered "working hours" under the particular collective bargaining agreement at issue, since the banquet employees in question were on call to work even during break time.

C. The ALJ was correct in ruling that the employer's prohibition on the wearing of union insignia violates §8(a)(1) of the Act.

The ALJ correctly found that Mr. Ron Kangail, a district manager for the Respondent, is a bargaining unit member and a union member.[21] D.4, L27-28. He is not required to wear a uniform. D.4, L.30-31. In November 2000, Mr. Kangail wore certain insignia to show union support and demonstrate that the Union did not have a contract with the Respondent. The insignia included an unadorned, 2-inch wide, green felt armband (G.C. Ex.62) and a business letter-sized sign (G.C. Ex. 18) which Mr. Kangail had placed in his car. The sign said "Workers at the Register-Guard Deserve a Fair Contract – Support the Eugene Newspaper Guild. – Want to Help? Call 343-8625". D.4, L.35-50. In December, 2000, his supervisor, Steve Hunt, told him not to display these items when doing company business off-premises. D4. L.52; D.5, L.1-2.

The ALJ correctly found that Respondent illegally maintained a rule which prohibits employees from wearing union insignia. D.10, L.45-46. He premised this finding on a correct reading of the law, that employees have a §7 right to wear and display union insignia. D.9, L.36-38, *citing* Republic Aviation, Inc. v. NLRB, 324 U.S. 793 (1945); Albertsons's, Inc., 319 NLRB 93, 102 (1995).

This right may only be overcome if the employer shows "special circumstances." D.9 ,

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[21]Respondent's attacks on Kangail's credibility, characterizing him in Respondent's eyes as an evasive witness, do not find support in the record, and the ALJ correctly did not make an adverse credibility finding of Kangail. The Board does not overrule an ALJ's credibility determination unless it is found to be against the clear preponderance of all the relevant evidence, clearly not the case here. See Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enf'd 188 F.2d 362 (C.A. 3, 1951).

L39-41, citing Mack's Supermarket, 288 NLRB 1082, 1098 (1988). See also Pioneer Hotel, Inc. v. NLRB, 182 F.3d 939 (DC Cir. 1999). These "special circumstances", as noted by the ALJ, may include employee safety, protecting a certain product or image, and ensuring harmonious employee relations. D.9, L.41-43, citing Nordstrom, Inc., 264 NLRB 698, 700 (1982).

None of these "special circumstances", as the ALJ correctly found, were present in this case. D.10, L.3-4.[22] This is the only conclusion possible from the evidence presented at the hearing. Mr. Kangail gave unrebutted testimony that he is not aware of any carrier quitting or breaking his or her independent carrier agreement or of any subscriber or purchaser refraining from purchasing newspapers as a result of display of union insignia. Tr. 266. No Company witness gave any testimony or presented any evidence that the Register-Guard's business interests were jeopardized by Mr. Kangail's green armband or by his display of the sign in his private car while out on company business. As to the hard business interest of maintaining or increasing revenue, there is no evidence, and not even the slimmest of suggestions, that the green arm band or car sign resulted in a loss of subscribers or any cancellation or other frustration of an independent carrier contract. (See, e.g., Ms. Walden's admission that there has been no evidence of adverse public reaction to arm bands and insignia, Tr. 56:22-57:6).

Respondent's argument that wearing union-related insignia during bargaining is in itself

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[22] The Respondent's assertion that the ALJ required the employer to determine that its business **had been** adversely affected in fact in order to establish that "special circumstances" existed to curtail Section 7 rights is a misreading of the decision. The ALJ actually stated that:

> ... Respondent has failed to show any special circumstance.... Thus, no probative evidence was adduced that Kangail's display adversely affected Respondent's business, employee safety, or employee discipline. D10, L1-4.

A close reading of the ALJ's decision thus reveals that he faulted the Respondent for not making a probative showing that the act of displaying the insignia in question adversely affects business, safety, or discipline concerns.

inherently adverse to the company's interests because it will increase support for the union's contract positions is inimical to the purposes of the Act. It would call for the suspension of Section 7 rights when exercise of them might enhance a union's bargaining position, thus defeating a key purpose of those rights. Furthermore, the company's argument that collective bargaining is inherently inimical to its commercial interests is at odds with the purposes of the Act, is not the perception of the employee who wore the arm band, and it is certainly no basis for curtailing Section 7 rights of expression.

Respondent also asserts that the mere fact that a customer might see the insignia constitutes "special circumstances" worthy of restricting Kangail's Section 7 rights. Importantly, the Board has repeatedly held, and the ALJ here has reaffirmed, that "special circumstances" do **not** obtain through mere exposure of customers to union insignia. D.9, L.43-45, *citing* Flamingo Hilton-Laughlin, 330 NLRB 287 (1999). As stated in Flamingo Hilton-Laughlin, "[t]he Board has consistently held....that **customer exposure to union insignia alone is not a special circumstance** allowing an employer to prohibit display of union insignia by employees." Id. at *9 (emphasis added). See also Meijer, Inc.v. NLRB, 130 F.3d 1209 (6th Cir. 1997); Control Services, 303 NLRB 481 (1991); Waste Systems, 322 NLRB 244 (1996).

This principle was clearly set out in United Parcel Service, 312 NLRB 576, 597 (1993), enf. denied, United Parcel Service v. NLRB, 41 F.3d 1068 (6th Cir. 1994) in which:

> the Board held that prohibiting the wearing of inconspicuous union pins was not justified by any special circumstance. There, the employers' justification for the prohibitions was the desire that its employees be "neatly attired." United Parcel Service, *supra* at 597. See also Nordstrom, Inc., 264 NLRB at 701-702 (policy prohibiting button held not to raise special circumstances based, inter alia, on employer's desire for 'good taste' and a sense of 'fashion.') Although the Board acknowledged in United Parcel Service that the image of a neatly uniformed driver was an 'important' business objective of the employer, the

> Board found that, as a practical matter, the employer could still advance its legitimate managerial objectives pertaining to 'neat' attire without prohibiting inconspicuous displays on uniforms.

BellSouth Telecommunications, Inc., 335 NLRB No. 18, 2001 WL 1006055 *8 (2001).

The cases which have deviated from this well-settled principle that mere contact with the public does not constitute "special circumstances" to curtail the Section 7 right to wear insignia have been few, and have been based on unusual factual circumstances which are not present here. Thus, Mid-State Telephone Corp. v. NLRB, 706 F.2d 401, 404 (2d. Cir. 1983), prohibited the specific inflammatory content of one particular t-shirt, which featured a shattered version of the company logo, connoting that the company was collapsing; Kangail's green armband and straightforward "fair contract" sign do not present such concerns. Eastern Omni Constructors, Inc. v. NLRB, 170 F.3d 418, 421, 422, 426 (4th Cir. 1999), cited by the Respondent, disallowed the placing of union decals on hard hats (but allowed them on clothing) because of their obstruction of an important safety decal– a factor not present here.

The Respondent also relies on NLRB v. Harrah's Club, 337 F.2d 177, 178, 179 (9th Cir. 1964) where the Ninth Circuit allowed an employer to prohibit union insignia when the insignia in question was not linked to a "purpose protected by the Act, i.e., collective bargaining or other mutual aid or protection", the employer (a nightclub) had a special need for a "uniform" appearance, and had previously consistently enforced its policy. See Pay 'N Save v. NLRB, 641 F.2d 697, 701 (9th Cir. 1981) (distinguishing Harrah's Club in case where union insignia did implicate § 7 rights and policy was enforced in discriminatory fashion). Similarly, in Burger King v. NLRB, 725 F.2d 1053 (6th Cir. 1984), the Court found that an employer's ban of union insignia was lawful where all employees were required to wear a standard uniform, and the

policy was not applied discriminatorily. In the present case, however, the insignia was directly connected to the bargaining for a successor contract, a clear purpose protected under the Act; there has been no finding that the ALJ found that employees were required to wear a uniform, and the Respondent has applied its policy in a discriminatory manner. D4, L30-31; D10, L5.

Finally, Respondent relies on John P. Scripps Newspapers and Redding Newspaper Journalist Assoc., 1992 NLRB LEXIS 746, where the ALJ found that reporters and photographers may not wear "Unfair to employees" button when interviewing witnesses, but may wear other union insignia, and may also affix bumper stickers to their cars when driving. Kangail's actions would have been clearly permissible under the ALJ's John P. Scripps holding– he was not a reporter or photographer, merely a district manager in Circulation who did not deal with "witnesses", and his green armband did not contain a message as overt as "Unfair to employees."[23]

In addition to finding that there were no special circumstances to justify the curtailment of the section 7 right to wear union insignia, the ALJ also correctly found that the policy was vague and discriminatorily applied. D.5, L.2-11. This finding was amply supported by evidence adduced at the hearing. Mr. Kangail's supervisor, Steve Hunt, testified that when ordering him to remove the union insignia, Hunt explained to him that the district managers "need to represent us [the company] in a positive way, and promote the company, and this would spark

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[23]While the need to maintain impartiality vis-a-vis the public might justify the banning of controversial, subject matter-specific insignia when a reporter is covering a particular story, it cannot justify requiring employees to forego the display of union insignia in all instances when they might be seen by the public. Certainly the fact that a newspaper is unionized does not itself signify that employees are biased or otherwise seeking goals contrary to the business interests of the employer.

controversial topics which we didn't feel was a part of what their job should entail." Tr. 372. Mr. Hunt admitted that he did not reference any specific insignia policy when he spoke with Mr. Kangail and that he did not know for sure "what written policy there is regarding [signs in cars]." Tr. 375. Nor did he know, he admitted, anything "specifically" regarding any written policy about insignia. Tr. 375. Mr. Hunt's supervisor, Charles "Chuck" Downing, the circulation manager, testified only vaguely about an insignia policy. He said that employees "while in the execution of their duties in the field, they're not to wear anything that is not appropriate to the business; that while out conducting business with the public, which would include carriers, subscribers, and non-subscribers, that they're basically there to do the business of the company as a representative." Tr. 378-379. Ms. Cynthia Walden, the company's Human Resources Director, testified that when meeting with the union president about Mr. Kangail's case, Ms. Prozanski asked for a copy of whatever rule governed Mr. Kangail's situation and the wearing of union insignia. Ms. Walden admitted that she did not give her a copy of any such rule then, or since, and that in fact no such rule exists. Tr. 427. Further, Mr. Kangail gave unrebutted testimony that other individuals wear non-business related insignia (such as sports and college caps) while out on company business.

Respondent's argument that the policy was "narrowly tailored", because employees could wear insignia in the privacy of their own homes, and when they were not in contact with the public, is misplaced. As discussed *supra*, employees have Section 7 rights to wear insignia at all times, unless the employer overcomes them with a showing of "special circumstances", a showing which, the ALJ correctly held, has not been made successfully here.

Finally, Respondent raises a number of issues regarding insignia that have been fully

dealt with *supra*. First, Respondent's charges that the Wright Line approach of shifting the burden to the employer, after the General Counsel has made out a prima facie case of discrimination, has been overruled. This contention is in error. See discussion on Greenwich Colleries, p. 5, *supra*. Second, as discussed *supra* in the context of the warning to Prozanski, the Board often has occasion to examine whether a challenged policy violates the Act by unlawfully circumscribing Section 7 rights without constituting "unlawful contract interpretation." See discussion, p.16-18, *supra*. Finally, Respondent claims that this "discriminatory enforcement" charge is time-barred because it was not filed within six months of the promulgation of the policy. As noted *supra*, p. 15-16, the Board has clearly held that the applicable 10(b) period for filing a challenge to a policy on the grounds of discriminatory enforcement begins when the discrimination occurs, not when the policy was first promulgated.

Thus, the ALJ correctly found that the Register-Guard has not demonstrated that it has a uniform attire policy. The ALJ also correctly found that the Employer did not demonstrate any special circumstance for its application of an unwritten, undistributed and vaguely defined insignia policy to prohibit Ron Kangail from wearing his forest-green, two-inch wide armband and from displaying in his private car a sign seeking support for a fair contract. These are quintessential Section 7 expressions, that is, employees showing solidarity for their cause in bargaining. The Company should be ordered to permit the wearing of the green armband and display of the sign, by Mr. Kangail and others, and to rescind any rule or policy which prohibits the lawful display of union insignia. These findings should be affirmed on appeal.

IV. CONCLUSION

For the foregoing reasons, the ALJ's Decision on February 21, 2002 that the Company violated the Act– by unlawfully disciplining Suzi Prozanski for engaging in Section 7 protected activities, maintaining a rule that prohibits the wearing of union insignia, discriminatorily maintaining and enforcing a rule which prohibits the use of communications equipment for union purposes, and by insisting on an illegal subject of bargaining– should be upheld on appeal.

Respectfully submitted,

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Dated: May 15, 2002

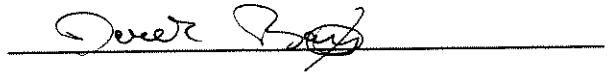
CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of the foregoing Charging Party's Answering Brief to Respondent's Exceptions to Decision of Administrative Law Judge this 15th day of May 2002 by delivering a copy of same by overnight delivery to:

Michael Zinser, Esq.
The Zinser Law Firm
150 Second Avenue, North
Nashville, TN 37201

and to:

Adam Morrison
NLRB, Subregion 36
601 SW Avenue Suite 1910
Portland, OR 97204



Derek J. Baxter